IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 14-0084

IN THE MATTER OF,

S.B.C., Jr.

Youth in Need of Care

BRIEF OF CROSS-APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Edward P. Mclean, Presiding

APPEARANCES:

BLACKFEET INDIAN
RESERVATION OF MT
Nathan St. Goddard
P.O. Box 849
Browning, MT 59417-0588
BLACKFEET TRIBE

ELIZABETH THOMAS
Elizabeth Cunningham Thomas,
PLLC
P.O. Box 8946
Missoula, MT 59807-8946
ATTORNEY FOR APPELLANT
FATHER

CAROLYNN M. FAGAN
Post Office Box 18323
Missoula, MT, 59808
Phones: (406) 728-0212
Fax: (406) 830-3876
ATTORNEY FOR APPELLANT
MOTHER

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER
Bureau Chief
Appellate Services Bureau
Attorney General's Office
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

FRED VAN VALKENBURG
Missoula County Attorney
200 W. Broadway
Missoula, MT 59802
ATTORNEYS FOR PLAINTIFF
AND APPELLEE

JANNA GOBEO
Attorney at Law
P.O. Box 3915
Missoula, MT 59806
ATTORNEY FOR YOUTH

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

I. The District Court erred in denying the Blackfeet Tribe's motion to Transfer Jurisdiction to the Blackfeet Tribal Court.

II. The District Court erred in determining that the Father was not a parent under the ICWA in conjunction with applicable Montana state law.

III. The District Court erred in terminating the Father's parental rights in the absence of expert testimony as required by the ICWA.

STATEMENT OF THE CASE

This is an cross-appeal by the Blackfeet Tribe [hereinafter, Tribe], from the Fourth Judicial District Court's, Missoula County, denial of transfer of jurisdiction to the Blackfeet Tribal Court and the termination of the natural father's parental rights. S.B.C., Jr. is an enrolled member of the Blackfeet Tribe. On June 3, 2013, the district court denied the Tribe, Father and Mother's request to transfer jurisdiction of the matter to the Blackfeet Tribal Court. Mother and Father's parental rights were terminated in January 2014. This case is governed by the Indian Child Welfare Act ("ICWA"), 25 U.S.C.§§ 1901, et. seq. The Tribe alleges the district court erred in denying transfer to the Blackfeet Tribal Court; erred in determining that the Father was not a "parent" under the ICWA; and erred in terminating Father's parental rights. The district court disregarded the fundamental requirements of the ICWA when it denied the Tribe's request to

transfer jurisdiction to the Blackfeet Tribal Court. The district court incorrectly considered the tribe's socio-economic conditions and the perceived inadequacies of the Tribe's social services and tribal court, in its decision not to transfer. The district court also inappropriately applied a "best interest of the child" standard pursuant to the Montana Code Annotated ("MCA"), instead of applying a "jurisdictional best interest of the child" as defined by the United States Congress, as its basis for denial. Additionally, the district court erred in relying upon *Adoptive Couple v. Baby Girl*, 133 S. Ct 2552, 186 L. Ed. 2d 729 (U.S. 2013), in determining that the Father was not a "parent" under the ICWA, and that the ICWA did not apply to the Father. The facts in this case are distinguishable from *Baby Girl*. Further, the absence of expert testimony, as required under the ICWA, requires a reversal of the order terminating Father's parental rights.

STATEMENT OF THE FACTS

The Father S.B.C., the Mother N.B. and the child, S.B.C., Jr. are all enrolled members of the Blackfeet Tribe. The Father and the Mother are not married. The Indian Child Welfare Act applies to this proceeding. (D.C. Doc. 1).

S.B.C., Jr., and his half-sister, who is not at issue in this appeal, were removed from their Mother's care when S.B.C., Jr. was twenty-seven (27) days old (D.C. Doc. 1.) The State had been called to the Mother's residence, because a

passerby witnessed the Mother's older child and cousin playing unsupervised and unclothed, in the middle of a busy street. (D.C. Doc. 1.) This wasn't the first occasion in which children were left unattended and playing on the road. (D.C. Doc. 1) When the State and law enforcement arrived at the Mother's residence, the Mother was not present and there was no adult present who was suitable to care for the children. (D.C. Doc. 1) Officers contacted the Mother and requested that she come back to the house, but she failed to return to the home and the State placed S.B.C., Jr. with a family member. (D.C. Doc. 1.) S.B.C., Jr. was placed with Sarah Floyd on October 11, 2011, and has remained in this placement since. (D.C. Doc 76.)

On July 28, 2011, the State filed a Petition for Emergency Protective Services and Temporary Investigative Authority. (D.C. Doc. 1.) Both parents stipulated to the petition. (D.C. Doc. 12.) Initially, Father believed that S.B.C., Jr. was his child, but he had his doubts and questioned paternity. (Tr. at 575, 614.) While the issue of paternity was pending, the Father declined to have visits with S.B.C., Jr. (D.C. Doc 76.) Father told his family not to become involved with S.B.C., Jr. until paternity was established. (D.C. Doc. 76.) Paternity was established in March 2012. (D.C. Doc. 76.)

The State petitioned for adjudication and temporary legal custody in November 2011. (D.C. Doc. 18.) After a contested hearing, the district court

adjudicated S.B.C., Jr. A Youth in Need of Care as to the Mother and granted temporary legal custody to the State January 2012. (D.C. Doc 76) A treatment plan was ordered for the Mother in February 2012 (D.C. Doc. 34). Adjudication as to the Father was granted in June 2012. (D.C. Doc. 50.) A treatment plan was ordered for the Father in June 2012. (D.C. Doc. 49.)

The Blackfeet Tribe intervened in this action in January 2012, preserving its right to motion the district court for a transfer of jurisdiction to the Blackfeet Tribal Court. (D.C. Doc. 23.) On March 6, 2013, the State filed a petition to terminate the Father's parental rights. (D.C. Doc. 48.) A hearing was set for May 2, 2013. (D.C. Doc. 47.1.) On April 10, 2013, the Blackfeet Tribe filed its Motion to Transfer Jurisdiction. (D.C. Doc. 52.) The Father and Mother joined in the Motion; the State and the attorney for the child opposed the motion. (D.C. Doc. 54, 57, 58.) The District Court granted the Motion on April 18, 2014, but rescinded the transfer order on April 25, 2014, after receiving the State's objection to the Motion. (D.C. Doc. 53, 56 and 54.)

A contested hearing regarding the transfer was held on May 14, 2013. S.B.C., Jr.'s foster mother, Sarah Floyd ("Floyd"), testified that traveling to the Blackfeet Tribal Court, if the matter was transferred, would not be an undue hardship. (Tr. at 182). The State conceded that the only contested issue was whether "the proceeding [was] at an advanced stage when the petition to transfer was received." (Tr. at 183.)

The district court heard testimony from Floyd, child protection specialist Sheila Finley ("Finley"), and Blackfeet Tribe ICWA coordinator Anna Fisher ("Fisher"). Over the repeated objections of the Father, Mother and Blackfeet Tribe, the district court heard testimony regarding S.B.C., Jr.'s best interest, the parents' compliance with treatment plans and the Tribe's motives for not assuming jurisdiction of S.B.C., Jr's. sister, J.B. (Tr. at 167-8, 170, 203-4, 265, 279-280.)

Prior to being placed with Floyd, S.B.C., Jr. was in five short term placements: two kinship placements, two placements at Watson's Children's Shelter and a failed placement with the Mother at Mountain Home. (Tr. at 204-212.) Floyd is a blood descendent of the Salish & Kootenai Tribes but is not an enrolled member. (Tr. at 169). She has adopted three children who are enrolled members of the Crow Tribe, and who have Chippewa and Cree descent. (Tr. at 170.) Floyd acknowledged that she was not familiar with specific customs of the Blackfeet tribe, only general Native culture. (Tr. at 193-4.)

When S.B.C., Jr. was removed from his Mother's care, the State explored two (2) potential placements with maternal family members before denying such placements, and shifting the search to place S.B.C., Jr. with the Father's family. (Tr. at 213-214, 217.) The State failed to seek out placement of S.B.C., Jr. with members of Father's family on the basis that the Father did not want himself or his family involved with the matter because paternity had not been established (Tr. at

216). After paternity was established in March 2012, the State attempted to contact the paternal grandmother of S.B.C., Jr. in August 2012, but she did not pick up the phone, and the State never did call her back. (Tr. at 217-218, 249-250.) The paternal grandmother later became a licensed foster care provider, who wanted S.B.C., Jr. to be placed in her care. (Tr. at 225-226.) The State did call the paternal aunt of S.B.C., Jr. who wanted to be considered a placement option (Tr. at 218.) The State attempted to communicate with the paternal aunt through e-mail, but she was not responsive to the e-mails, so the State wrote her off as a placement option. (Tr. at 219-221). Finley did not follow up with the ICWA coordinator to determine if additional family or Blackfeet placement options were available. (Tr. at 221-222.) Finley conceded that she should have made more efforts to contact the paternal grandmother. (Tr. at 233-234.) Although the Blackfeet Tribe has approximately 17,000 members, Finley stated that her active efforts to place S.B.C., Jr. with a paternal family member, amounted to contacting the parental grandmother and aunt. (Tr. at 236.)

Finley admitted that her opposition to the transfer was based upon her belief that the Blackfeet Tribal Court could not be objective like the district court, regarding S.B.C., Jr.'s placement. (Tr. at 264.) Floyd also expressed distrust with the judgment of the Blackfeet Tribal Court. (Tr. at 187.)

Fisher was the ICWA coordinator for the Blackfeet Tribe between

September and November 2012. (Tr. at 282.) Fisher, also deemed an ICWA expert by the district court, testified that under the ICWA, the district court should not use a "best interest" standard as reason to deny transfer to the Blackfeet Tribal Court (Tr. at 284-285.) Fisher testified that the Tribe intended to place S.B.C., Jr. with his paternal grandmother with a slow transition plan in place. (5/14/2013 Tr. at 305-6.)

Finley testified that the Tribe refused to accept jurisdiction of S.B.C., Jr.'s sister, J.B., because of financial reasons (Tr. at 265, 279-280.) The district court questioned the Tribe's motives for not assuming jurisdiction over J.B. (Tr. at 334.) The district court "found it particularly disturbing" that the Tribe refused to take jurisdiction because of financial reasons, and that the costs of rAising J.B. would be at the Missoula County taxpayers' expense, for the purpose of reserving tribal resources. (D.C. Doc. 76.) Judicial notice was taken by the district court that the Tribe has historically denied assuming jurisdiction of Blackfeet children based on financial decisions in previous cases (D.C. Doc. 76.) After the district court denied transfer to the Blackfeet Tribal Court, the Mother and Tribe presented evidence showing that the Tribe's reason for not assuming jurisdiction of J.B. was not based on the Tribe's finances. (D.C. Doc. 79.)

The district court admonished the Tribe for not showing more interest in their children when they were involved in State Court matters, and put the burden

of proving that it would be in the best interests of S.B.C., Jr. to have the matter transferred to the Blackfeet Tribal Court. (Tr. at 199-200.) The district court accused the Tribe of not taking jurisdiction because the Tribe wanted the State to expend its money, rather than expend tribal funds. (Tr. at 317.)

It was the judgment of the district court, that the Blackfeet Tribe only flexed its sovereign rights, when it was financially beneficial to do so. (D.C. Doc. 76). The district court concluded that the Tribe sat on its hands and delayed seeking transfer based on financial reasons, and now in the 11th hour, wanted to take jurisdiction. (D.C. Doc. 76).

The district court denied the motion to transfer, finding that the Blackfeet Tribe had delayed in participating in the district court proceedings and good cause existed to deny transfer. (D.C. Doc. 76.)

A hearing on the State's petition to terminate was held on September 10, 2013. Floyd, Finley, and the Father testified. Additionally, the State's ICWA expert, Susan Stevens ("Stevens") testified. (D.C. Doc. 91.)

The Father testified he was at the hospital the day after S.B.C., Jr. was born. (Tr. at 601.) Father had S.B.C., Jr. in his care for an evening during Indian Days, in Browning, MT, which included feeding and changing S.B.C., Jr's diapers. (Tr. at 609.) The relationship between the parents was off and on shortly after the child was born. (Tr. at 573.) Prior to removal, as an effort to establish a

relationship with his son, the Father would visit his son at the Mother's residence; Father bought formula, would hold S.B.C., Jr., give him a bottle, change his diapers and would bring him what he needed. (Tr. at 606-608, 611-614.) Father testified that he wanted to have a relationship with his son. (Tr. at 596-597, 601.)

The Father completed an alcohol assessment with Crystal Creek and followed their recommendations. (Tr. at 584-586.) He also began parenting classes with Blackfeet Head Start. (Tr. at 587.)

The State's ICWA expert Stevens testified that the parental rights of the Mother should be terminated (Tr. at 550.) She concluded that the Mother's continued custody of S.B.C., Jr., would result in serious emotional or physical damage. (Tr. at 550.) Stevens and the State had a meeting concerning the case, prior to Stevens giving her testimony. (Tr. at 548.) After hearing the Father's testimony and to the shock of the State, Stevens determined that the Father's rights should not be terminated. (Tr. at 542, 544.) Stevens testified that generally, the parental rights of a Native American parents should not be terminated. (Tr. at 543.) Stevens conceded that continued custody with S.B.C., Jr. would not result in serious emotional or physical damage. (Tr. at 545.) She opined that the best interests of S.B.C., Jr. was to be with his Father. (Tr. at 545-546.) Stevens also testified the Father had shown enough interest and efforts in his son's life, that his parental rights shouldn't be terminated. (Tr. at 544-545.) She said that the Father

should be given a short amount of additional time to complete very specific tasks. (Tr. at 546.)

After Stevens testified that she did not believe the Father's rights should be terminated, the State attempted to have her testify that the ICWA did not apply to the Father in light of *Baby Girl*. (Tr. at 555.) Stevens conceded that she had not read the case in its entirety and was relying upon statements made by the State's counsel as to the holding in the case. (Tr. at 557.)

At the end of the termination hearing, the district court permitted additional briefing on the applicability of the ICWA to the Father in light of *Baby Girl.* (D.C. Docs. 87, 88, 89.)

On January 15, 2014, the district court issued its order terminating the Father's parental rights. (D.C. Doc. 91.) The district court determined that the Father was not an "Indian Parent", and as such, "the rights ICWA confers to an 'Indian Parent' do not apply to Father." Finding the Father was not a parent under the ICWA, the district court concluded that the testimony of an "ICWA expert is not required as a prerequisite to terminate Father's parental rights." (D.C. Doc.91.)

This Court authorized the Tribe to file an Out-of-Time Cross Appeal.

SUMMARY OF THE ARGUMENT

The district court erred in denying the Blackfeet Tribe's motion to

transfer the matter to the Blackfeet Tribal Court. The district court failed to follow the ICWA when it denied transfer. The district court disregarded applicable federal guidelines and applied inapplicable state law as its basis for denial. The district court improperly placed the burden on the Blackfeet Tribe to show why the matter should be transferred to the Blackfeet Tribal Court, when under the ICWA, such burden must be carried by the state. The district court's orders contain statements indicating a bias and lack of confidence in not only the tribal court, but the Blackfeet Tribe as a whole. For these reasons, this Court should reverse the district court's order denying transfer.

The district court furthered erred in terminating the Father's parental rights and finding that the ICWA did not apply to the Father. The district court incorrectly applied *Baby Girl* when finding the Father was not an "Indian parent." Additionally, the State did not meet its statutory obligation under the ICWA of providing expert testimony that Father's parental rights should be terminated beyond a reasonable doubt.

STANDARD OF REVIEW

This Court reviews a district court's findings of fact to determine whether they are clearly erroneous. *In re M.P.M.*, 1999 MT 78, ¶ 12, 294 Mont. 87, 976 P.2d 988. Findings of fact are clearly erroneous if they are not supported by substantial evidence; or, if so supported, the district court misapprehended the

effect of the evidence; or, if so supported and the district court did not misapprehend the effect of the evidence, this Court is left with the definite and firm conviction that a mistake has been committed. *In re S.M.*, 1999 MT 36, ¶ 15, 293 Mont. 294, 975 P.2d 334. This Court reviews a district court's conclusions of law to determine whether its conclusions are correct. *In re M.P.M.,* ¶ 12.

"A district court's application of the law to the facts of a case is a legal conclusion which we review to determine whether the interpretation of the law is correct." *In re J.W.C.,* 2011 MT 312, ¶ 15, 363 Mont. 85, 265 P.3d 1265 (quoting *In re C.H.,* 2000 MT 64, ¶ 9, 299 Mont. 62, 997 P.2d 776).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING THE TRIBE'S MOTION TO TRANSFER JURISDICTION TO THE BLACKFEET TRIBAL COURT.

The Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963, was passed in 1978 to "protect the best interests of Indian Children and to promote the stability and security of Indian tribes and families." 25 U.S.C. § 1902. As the United States Supreme Court has held, "at the heart of the ICWA are its provisions concerning jurisdiction over Indian Custody proceedings." *Mississippi Band of Choctaw Indians v. Holyfield,* 490 U.S. 30, 36, 109 S.Ct. 1597, 1602, 104 L. Ed.2d 29, 39 (1989). Through ICWA, "Congress has expressed its clear preference for… deferring to tribal judgment on matters concerning the custody of tribal

children…" *Bureau of Indian Affairs, Guidelines for State Courts Indian Child Custody Proceedings*, 44 Fed. Reg 67, 591. [hereinafter Guidelines]. The Montana Supreme Court explained in *Skillen* that, "tribal courts are uniquely and inherently more qualified than state courts to determine custody in the best interest of an Indian child." *In the Marriage of Skillen,* 1998 MT 43, ¶ 39, 287 Mont. 399, 415, 956 P.2d 1, 10 (1998).

25 U.S.C. § 1911(b) provides that:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

This section clearly creates a presumption in favor of tribal jurisdiction. As noted in Section 1911(b), the state "shall" transfer such proceeding upon the petition of either parent or the Indian child's tribe.

The Guidelines promulgated by the Bureau of Indian Affairs [hereinafter BIA] in 1979 are meant to help state courts interpret and apply ICWA. *In re M.B.*, 2009 MT 97, ¶ 16, 350 Mont. 76, 204 P.3d 1242. This Court has previously determined that these Guidelines are persuasive and will be applied when interpreting the ICWA. *In re J.W.C.,* 2011 MT 312, ¶ 21.

In regards to transfer, the BIA Guidelines provide:

(b) Good cause not to transfer this proceeding may exist if any of the following circumstances exist:
(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.
(ii) The Indian child is over twelve years of age and objects to the transfer.
(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.
(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.
(c) Socio-economic conditions and the perceived inadequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

44 Fed. Reg. 67591.

In addition, this Court has "determined that the 'best interest of the child' test will be applied in Montana in determining good cause not to transfer jurisdiction of custody proceedings of Indian children." *In re T.S.*, 245 Mont. 242,247, 801 P.2d 77, 80 (1990). "This 'best interests of the child' test should not be confused with the 'best interests of the child' test applied under Mont. Code Ann. Section 40-4-212. It should also not be confused with the criteria used to determine child abuse, neglect, and dependency and to terminate parent-child legal relationships under Title 41, Chapter 3, MCA." *Id.* (emphasis added).

Rather, the test is a "jurisdictional best interests of the child test." *Id.* As this Court has held, "the burden of showing good cause to the contrary must be

carried by the State with clear and convincing evidence that the best interests of the child would be injured by such a transfer." *In re M.E.M.*, 195 Mont. at 336 (1981) 635 P.2d 1313, 1317.

On April 10, 2013, the Tribe petitioned the district court to transfer the proceeding to the Blackfeet Tribal Court. Mother and Father joined in the Tribe's petition, with the State being the only party objecting to the transfer. (D.C. Doc. 52, 54, 57, 58.) The district court initially granted the Tribe's request to transfer jurisdiction on April 18, 2013, but then quashed the order on April 25, 2013; the same day the State filed its motion to reconsider the transfer order. (D.C. Doc. 53, 56, 54, 76.) The district Court's reason for quashing its order was based on the Tribe's inaccurate statement in the petition that ICWA required the court to transfer the matter upon the Tribe's request. (D.C. Doc 76, ¶ 57.)

The language at issue in the Tribe's petition is as follows:

> This motion is necessary and appropriate as The Indian Child Welfare Act of 1978, 25 U.S.C. Section 1911(b) requires that the state court transfer a child custody proceeding involving an Indian child to the jurisdiction of the tribe when the Indian child's tribe petitions the State court. The Blackfeet Tribe has already preserved the right to transfer jurisdiction to the Blackfeet Court if necessary when they filed their Notice of Intervention.

(D.C. Doc. 52.)

There is clearly no inaccurate statement in the Tribe's petition as the district court found. The Tribe cited the applicable statutory transfer language found in 25 U.S.C. § 1911(b). Additionally, the Tribe's petition to transfer didn't

make any representations indicating that the parties agreed to, and or didn't object to the transfer of jurisdiction.

Finley testified that jurisdiction of S.B.C., Jr. should stay in the district court because the district court had been involved with the case from the beginning and the court would be objective. (Tr. at 264.) The district court made it a point to take judicial notice of the Tribe's historic inability of getting involved in ICWA matters before the court. (D.C. Doc. 76, ¶ 52.)

Given the district court's involvement in this case, and its prior history being involved with ICWA matters, there was no basis for the court to quash its order transferring jurisdiction to the Tribe. Alternatively, if the district court had any reservations regarding the transfer petition, the court could have held a hearing on the issue. Under the ICWA, the district court made the right decision to transfer the proceeding to the Blackfeet Tribal Court. The fact that the district court quashed its order transferring jurisdiction on the same day that the State asked for it, and then blamed the Tribe for the court's mistake in granting the Tribe's petition in the first place, makes the court look biased rather than objective. The district court erred when it quashed its order transferring jurisdiction to the Blackfeet Tribal Court.

Under the ICWA, it is clear that the State must prove by clear and convincing evidence that a transfer to the tribal court is contrary to the child's

jurisdictional best interests. However, this district court placed the State's burden on the Blackfeet Tribe and required the Tribe to prove that S.B.C., Jr.'s best interest would be served by transferring jurisdiction to the Blackfeet Tribal Court.

> But what I can't appreciate is how someone can come in and want to destroy the mother-son bond, that has been established in this case, as well as the other brothers and sisters, and father-and-child bond, after twenty months of showing no interest. And, I just – I want to tell you that, Mr. Goddard, because that's the burden I see on the tribe, when we start talking - what's the best interest of the child under the ICWA Act. There's no question that the priority for protecting the Indian heritage is very high. But, we, also, have the emotional wellbeing of the child, that probably has priority, and that's the burden I see on the Blackfeet Tribe, right now.

(Tr. at 199-200.)

The district court cited Montana law and policy as its basis for refusing to transfer jurisdiction. The district court stated that:

> "Under Montana law delay in child abuse and neglect proceedings undermines the overarching policy that the child's health and safety are paramount (D.C. Doc. 76, ¶ 18); it is the policy of the state of Montana to provide for the protection of children (¶ 20); Montana policy recognizes . . . that all children have a right to a healthy and safe childhood in a permanent placement . . . and in implementing the policy of this section the child's health and safety are of paramount concern(¶ 21 & 22); The court's primary consideration is the physical, mental, and emotional condition and needs of the child, and therefore the best interests of the child are paramount and must take precedence over parental rights. (¶ 23)".

The Tribe's timing of its transfer petition, and tribal finances were also areas of concern for the district court.

> But, why does the B1ackfeet Tribe sit there and have the chi1d in a p1acement for twenty months, and have the bonding between the foster parents and S.B.C., Jr. get estab1ished, and all the love of parent and child, while the Tribe, with the extended fami1y, stays over on the B1ackfeet - and doesn't come over and say - give us our chi1d? You know, it's because you want the State to expend its money, rather than the Tribe to expend it. Isn't that the bottom 1ine?

(emphasis inserted) (Tr. at 317.)

The district court's opinion and order also concentrated on the timing of the Tribe's motion to transfer and its opinion that the Tribe's delay was motivated by financial reasons.

Findings of fact:

¶48. The Court finds it particularly disturbing that Fisher characterizes Blackfeet children as sacred, and yet the Tribe refused to accept jurisdiction over S.B.C., Jr.'s half-sister, J.B…because she is not IV-E eligible and Fisher sees no contradiction in approving CFS having permanent custody and jurisdiction over J.B. until she turns eighteen years of age, to be raised at Montana and Missoula County taxpayers' expense, for the purpose of reserving tribal resources…

¶49. S.B.C., Jr. is IV-E eligible, and the Tribe will presumptively lose the right to those funds if S.B.C., Jr. is permanently adopted by a non-Blackfeet family.

¶52. The Court takes judicial notice that the Blackfeet Tribe has historically made financial decisions in previous cases before this Court not to become involved in State court dependent and neglect proceedings or seek transfer of jurisdiction over the Tribe's children who are eligible funds, unless those funds are jeopardized by the State court proceedings through termination of parental rights proceedings and adoption of Blackfeet children to non-Blackfeet adoptive parents.

¶53. It is the sound judgment of this Court that the Blackfeet Tribe wants to exercise its sovereign rights as a Nation, but only when it is in the best

financial interests to do so…

Conclusions of law:

¶ 24. While this State District Court appreciates the stated purposes of the ICWA to preserve tribal populations and cultural heritages by curbing mass migration of tribal children away from reservations based on Caucasian middle-class values, the Tribe in this matter chose to sit on its hands and delay seeking jurisdiction of S.B.C. Jr., for tribal financial reasons, and allowed him to remain in the care of a Salish and Kootenai foster mother domiciled off the reservation, with no attempts to initiate the Youth's contact with the Tribe or the birth Father's extended family, and now wants to take jurisdiction at the 11th hour to prevent the Youth's permanent adoption by a ICWA- qualified Native American family, even though the family qualifies as one of the preferential placements under the ICWA and BIA guidelines.

¶25. While 44 Fed.Reg. 67,591 does provide non-binding guideline that socio-economic conditions and the perceived inadequacy of tribal or BIA social services or judicial systems may not be considered in a determination that good cause exists to deny transfer, this Court does not believe this guideline was intended to support the Blackfeet Tribe intervening by motion and then sitting on its hand for months…

¶26. This is not a case of the State making value judgments based on Caucasian middle-class values, but a Tribe who claims their children are sacred and yet are willing to sit on its hands for financial reasons…

(D.C. Doc. 76.)

The district court failed to follow the ICWA and the BIA Guidelines when it denied transferring the matter to the Blackfeet Tribal Court. The court's reasoning and analysis to deny transfer was not based on the ICWA or Guidelines, but rather, impermissible State law and policy. When the State opposed transfer to the Tribe, instead of making a "jurisdictional best interest" determination

regarding transfer as defined by Congress in the ICWA, the district court improperly relied on MCA Title 41, Chapter 3 as its basis for making a "best interests" decision to deny transfer.

This Court has ordered state courts to apply the Guidelines when interpreting the ICWA. The district court was aware that the Guidelines exist and that they pertain to ICWA, but that's as much credit the district court gave the Guidelines before casting them to the side. It was apparent that the Guidelines didn't hold any water with the district court, as evidenced by the court repeatedly slamming the Tribe for making financial decisions prior to assuming jurisdiction in ICWA matters. The Guidelines prohibit the district court from using socio-economic conditions as a basis for denying transfer. (Emphasis added).

Although S.B.C., Jr.'s sister N.B., was not part of the transfer proceeding, the district court incorrectly found that the Tribe declined jurisdiction of N.B. due to financial reasons. After the district court criticized the Tribe for not assuming jurisdiction over J.B., the court took judicial notice that the Tribe declines jurisdiction in most of the ICWA cases in front of the district court, due to financial reasons. Financial reasons had nothing to do with the Tribe declining jurisdiction of N.B. The Tribe declined jurisdiction of N.B. because she was not an enrolled member of the Blackfeet Tribe. (D.C. Doc 79.)

The Tribe's finances, or lack thereof, are brought up by the district court over

half a dozen times in its opinion and order. The district court made one positive comment on the purposes of IWCA, and then in the same sentence, disregarded the ICWA by criticizing the Tribe for sitting on their hands for financial reasons, and waiting till the 11th hour to take jurisdiction. (D.C. Doc. 76.) The district court opined, "This is not a case of the State making value judgments based on Caucasian middle-class values…" but then criticized the Tribe for "sitting on its hands for financial reasons, and crying a foul and seeking jurisdiction only after State resources have been exhausted." (D.C. Doc 76.) The district court might not have made judgments based on Caucasian middle-class values, but its decision to deny transfer was based on impermissible socio-economic conditions and the perceived inadequacies of the Tribe.

The Tribe's finances are not the concern of the district court. Many Montana tribes like the Blackfeet have limited resources in comparison to their States. In fact, most tribes within the United States are very limited in resources when compared to their respective state. The financial disparity between the tribes and states is precisely why socio-economic conditions should not be considered when determining whether or not good cause exits to deny transfer to the tribal court.

In addition to socio-economic conditions, the Guidelines also prohibit state courts from considering any perceived inadequacies of the tribal social

services or court system in determining that good cause exist to deny transfer. In this case, the district court, the State and Floyd, all expressed perceived inadequacies of the Blackfeet Tribe, the tribal Social Services and tribal Court.

The district court concluded that if jurisdiction was transferred, the Tribe would remove S.B.C., Jr. "from the only loving, secure home he has ever known, place him with his paternal grandmother…and in essence, begin the whole custodial process anew…or allow the Youth to be passed from family tribal member after another under the guise of the position that it is the Tribe's responsibility to raise its children for the rest of his childhood…" (D.C. Doc. 76.)

Finley, the State's child protection specialist, admitted that her opposition to the transfer was based upon her belief that the Blackfeet Tribal Court could not be objective like the district court was, regarding S.B.C., Jr.'s placement. (Tr. at 264). Floyd did not trust that tribal court could make the best decision regarding S.B.C., Jr. (Tr. at 187.) A key reason why Congress passed the ICWA was to avoid this type of ethnocentric attitude expressed by the district court and State. As Congress found, "States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." 25 U.S.C. § 1901(5).

The failure by the district court and State to give any legitimacy to the Blackfeet Tribal Court, to do what's right in regards to one of their own members is unfounded. The Blackfeet Tribe has been raising their children for thousands of years. There is no legitimate reason to assume that the Blackfeet Tribe wouldn't act in the best interests of S.B.C., Jr. The Tribe has its own laws that govern dependent/neglect cases, and the Tribal Court is fully capable of rendering a decision that is in the best interests of S.B.C., Jr. Contrary to what is perceived by district court, the Blackfeet do not pass their children around to any willing taker like a hot potato. There is no reason to fear the Blackfeet Tribe. As this Court has found, "The ICWA demonstrates confidence in the tribal forum, not only for the substantive expertise of its perspective, but also for its ability to make a fair and appropriate determination and to serve the interests of all the parties, including the state." *In the Marriage of Skillen*, 1998 MT 43, ¶ 39. The ICWA gives clear preference to have tribal courts make those custody determinations.

The district court fails to take into account that in this case, it is not just the parents requesting the transfer, but the Blackfeet Tribe itself is seeking transfer. The Tribe has an independent interest in one of its own children. Children are the only way that the Blackfeet Tribe can exist. It is through the children, that Blackfeet customs and traditions will survive. As the ICWA states at 25 U.S.C. § 1901(3): [T]here is no resource that is more vital to the continued existence and

integrity of Indian tribes than their children." Similarly, this Court has acknowledged that the ICWA "represents Congressional recognition of the concomitant cultural interests of Indian tribes and Indian children; interests fundamental to the perpetuation and preservation of their mutual and valuable heritage." *In the Matter of M.E.M.*, at 329. This Court has further identified the risk to Montana tribes: "preservation of Indian culture is undoubtedly threatened and thereby thwarted as the size of any tribal community dwindles. In addition to its artifacts, language and history, the members of a tribe are its culture. . . . In applying our state law and the Indian Child Welfare Act we are cognizant of our responsibility to promote and protect the unique Indian cultures of our state." *Id.*

In *Holyfield*, the Indian children had been placed in foster care for years, similar to S.B.C., Jr. The United States Supreme Court addressed that issue in the following:

> We are not aware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on blank slate in the same way it would have in January 1986. Three years' development of family ties cannot be undone, and separated at this point would doubtless cause considerable pain… Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of who should make the custody determination concerning these children-not what that outcome of that determination should be… Rather, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts to fashion an appropriate remedy." Ibid.

Holyfield, 490 U.S. at 53-54. (emphasis added).

In the district court's opinion and order on the Tribe's motion to transfer, the court condemns the Tribe for attempting to assume jurisdiction, and effectively tearing apart the bonds between S.B.C. Jr. and his foster family. The district court should not be afraid of the tribal court. Instead, the district court should defer to the experience, wisdom and compassion of the Blackfeet Tribe, and allow the Tribe to look after the best interest of one of its own children.

Although S.B.C., Jr. was placed with Floyd, an ICWA compliant foster care placement, the State failed to make diligent attempts to place S.B.C., Jr. with extended family members as required under the ICWA preferences.

> [A] diligent attempt to find a suitable family meeting the preference criteria be made before consideration of a non-preference placement be considered. A diligent attempt to find a suitable family includes at a minimum, contact with the child's tribal social services program, a search of all county or state listings of available Indian homes and contact with nationally known Indian programs with available placement resources.
>
> Since Congress has established a clear preference for placements within the tribal culture, it is recommended in subsection (b) that the party urging an exception be made be required to bear the burden of proving and exception is necessary.

44 Fed. Reg. 67595.

"The cultural diversity among Indian tribes is unquestionably profound yet often not fully appreciated or adequately protected in our society. Our constitution recognizes 'the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity'.

1972 Mont.Const., Art. X, § 1(2)." *In re M.E.M.* at 333.

Finley's search to place S.B.C., Jr. with an extended Blackfeet family member was by no means a "diligent search." Notwithstanding the Mother and Father both having large families, Finley's search to place S.B.C., Jr. with a relative amounted to looking at a total of four (4) different extended family members. Finley's justification for not making active efforts to search for a paternal member placement option was because the Father told her not to since paternity had not yet been established. (Tr. at 216.) Once paternity was established, Finley called the paternal grandmother, who failed to pick up the phone, and Finley didn't bother to call back. (Tr. at 217-218, 249-250.) The paternal grandmother later became a licensed foster care provider, who wanted to be considered a placement option for S.B.C., Jr. (Tr. at 225-226.) The State then called the paternal aunt of S.B.C., Jr. who wanted to be considered a placement option. (Tr. at 218.) Finley attempted to follow up with the paternal aunt through e-mail, but because she was not responsive to the e-mails, the State did not pursue her as a placement option (Tr. at 219-221). Finley did not follow up with the ICWA coordinator to determine if additional family or Blackfeet placement options were available. (Tr. at 221-222.) Finley conceded that she should have made more efforts to contact the paternal grandmother, despite Father's requests to the contrary. (Tr. at 233-234.) Finley also admitted that her opposition to the

transfer was based upon her belief that the Blackfeet Tribal Court could not be objective like the district court, regarding S.B.C., Jr.'s placement. (Tr. at 264.) S.B.C., Jr. was ultimately placed with Floyd, with the consent of the Tribe's ICWA Coordinator. Floyd has some Indian heritage, but she is not a member of the Blackfeet Tribe or a blood relation to the Mother or Father.

Finley's half-hearted search to place S.B.C., Jr. with an extended family member, was motivated by her fear and distrust with the Blackfeet Tribe. Common sense should have deterred Finley from complying with Father's request. Regardless of Father's wishes, the Guidelines clearly require the State to conduct a diligent search of extended family members. Additionally, Finley isn't relieved from making active efforts of placing S.B.C., Jr. with extended family because the Tribe's ICWA coordinator initially agreed to the placement with Floyd. Despite the Blackfeet Tribe being the largest tribe in the Northwest, Finley stated that her active efforts to place S.B.C., Jr. with a paternal family member amounted to contacting the parental grandmother and aunt. The bottom line is that Finley failed to diligently search for higher placement preferences under the ICWA.

The district court erred when it found that there was good cause to deny transfer based on the timeliness of the Tribe's motion to transfer jurisdiction. The district court incorrectly relied upon *In re A.P.* in determining that the

proceedings were at an advanced stage, and that the Tribe's motion was untimely, *In re A.P.*, 1998 MT 176, 289 Mont. 521, 962 P.2d 1186. This Court has explained that each stage of child custody proceedings involves "different state court proceedings, each with its own statutory requirements." *In re A.P.*, at ¶ 17. For instance, when pursuing a TIA, the department proceeds under M.C.A. § 41-3-404, whereas in pursuing termination of parental rights it operates under M.C.A. § 41-3-601-602. *Id.* This case is distinguishable from *A.P.* In *A.P.*, the tribal court sought to transfer jurisdiction after parental rights had been terminated and long term custody was granted to the State. The proceedings had been "completed and closed for a month when the Tribes' transfer motion was filed." *In re A.P.*, at ¶ 27. This case is different. The State filed its motion to terminate parental rights on March 6, 2013, and a hearing was set for May 2, 2013. The Tribe filed its motion to transfer on April 10, 2013, just thirty-five (35) days after the State's motion and twenty-two (22) days prior to the termination hearing. Parental rights were still intact when the Tribe promptly filed its motion to transfer.

Additionally, the State agreed that under the ICWA, the district court could not take into consideration the entire amount of time that S.B.C., Jr. was in the custody of the State, as a basis to deny transfer. The State acknowledged that under the ICWA, the court should only consider the subsequent termination

proceeding and the thirty-five (35) days between the State's motion to terminate, and the Tribe's motion to transfer, as a basis to deny transfer for good cause. (Tr. at 331-332.) The Tribe's motion to transfer was consistent with the Guidelines; upon receiving the State's motion to terminate parental rights, the Tribe promptly filed for transfer.

Despite the ICWA, Guidelines and this Court, all promoting jurisdictional preference to tribes in cases involving Indian children, the district court decided not to follow such tribal preference. Instead of following the ICWA and acknowledging that the Tribe was inherently more qualified to decide the best interests of its own child, the district court blasted the Tribe for not being more fiscally responsible and criticized it for attempting to take jurisdiction over S.B.C., Jr. Although the ICWA demonstrates confidence in the tribal forum, and the Mother, Father and Tribe requested that jurisdiction be transferred, the district court expressed its skepticism that the Tribe would do the right thing. The district court's dismal characterization of the Tribe and its ability act in the best interests of one of its own citizens, is what Congress was attempting to avoid when passing the ICWA. The district court erred in denying transfer to the Blackfeet Tribal Court.

The State did not successfully prove, by clear and convincing evidence that good cause existed to deny transfer to the Blackfeet Tribal Court. The

ICWA is not discretionary, it must be followed. The district court failed to follow the ICWA when it improperly considered the Tribe's socio-economic conditions and perceived inadequacies of the tribal court and tribal social services. The Tribe's interest in one of its children is higher when the State attempts to terminate parental rights. The Tribe moved to transfer jurisdiction because it was the right thing to do. S.B.C., Jr., is vital to the continued existence of the Blackfeet Tribe, and there is no basis for the district court to question the Tribe's ability to act in the best interests of one of its own children. The Blackfeet Tribal Court is the proper forum to hear this matter.

II. THE FATHER IS AN INDIAN PARENT, UNDER THE ICWA.

In terminating the Father's parental rights, the district court inaccurately relied upon *Baby Girl* and determined that the ICWA did not govern the Father's parental rights to S.B.C., Jr. In *Baby Girl* a non-Indian mother, with sole custodial rights under Oklahoma law, voluntarily and legally initiated the adoption of the child to a non-Indian couple, while she was pregnant. There was no State or protective services involvement. During the pregnancy, the mother and father's relationship deteriorated and through text messaging, the mother asked if the father would relinquish his parental rights. The father confirmed in a reply text, that he would relinquish his parental rights. As he understood at the time, he would be relinquishing those rights to the mother. When the father learned that he was

giving up his daughter to adoption, he quickly sought to restore his parental rights. The state supreme court held that the father was a "parent" as defined under the ICWA, which entitled him to the protections of the ICWA. On appeal, the United States Supreme Court determined that the father was not a "parent" under the ICWA, and not entitled to the protections of the ICWA, as he had never had legal custody of the child under Oklahoma state law. There are several differences in this case that distinguishes it from that of *Baby Girl.*

Baby Girl involved the attempted voluntary adoption of a child. In the matter of S.B.C., Jr., the State initiated the proceedings including filing a petition to involuntary terminate Mother and Father's parental rights. In *Baby Girl*, the father was in the military, away from the mother and consciously agreed to voluntarily relinquish his parental rights. In this case, the Father indicated that he wanted to be a part of his son's life and was involved with S.B.C., Jr., prior to his removal. In the 27 days prior to the State removing S.B.C., Jr., The Father fed him bottles, changed his diapers, visited him and brought him to see his paternal grandmother during a cultural event in Browning, Montana. The Father's infant rearing knowledge was limited, but he indicated that once S.B.C., Jr. got older that he could live with him without the assistance of the Mother. Another factual difference in this case, is the relationship between the Mother and Father. Unlike in *Baby Girl*, the Father and Mother here, were in an on-again/off-again relationship until shortly after the birth of

S.B.C., Jr. Under Oklahoma state law, the father in *Baby Girl* had no legal or custodial rights as an unwed father. Under Montana law, the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents. § 40-6-103, MCA. Accordingly, the Father is a parent under Montana law, and the protections afforded under the ICWA apply to him.

As the United States Supreme Court said in *Baby Girl*, "when, as here, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights, the ICWA's primary goal of preventing unwarranted removal of Indian children and the dissolution of Indian families is not implicated." *Baby Girl,* at 2561. As stated, this matter is not like *Baby Girl*: the Mother in this case is Blackfeet; the Blackfeet Father was a legal parent under Montana law and involved in his son's life; and the State was attempting to involuntary terminate the parent's rights. The State also treated the Father as a parent under the ICWA and Montana state law from the time S.B.C., Jr. was removed, until the district court terminated Father's rights. In fact, it was not until the State's ICWA expert testified that the Father's parental rights should not be terminated, when the State changed its course and denied that the Father was a parent. The district court erred in relying upon *Baby Girl* in holding that the ICWA did not apply to the Father.

III. THE DISTRICT COURT ERRED IN TERMINATING THE FATHER'S PARENTAL RIGHTS IN THE ABSENCE OF EXPERT TESTIMONY.

The ICWA requires the evidence for terminating parental custody to "include testimony of qualified expert witnesses that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 U.S.C.S. §1912(f). This requirement is further codified in Mont. Code Ann. § 41-3-609(5). The burden is on the State to prove this requirement beyond a reasonable doubt. "Accordingly, failure to elicit expert testimony regarding whether continued custody will result in serious emotional or physical damage to the children requires reversal of the termination order." *In re K.B. & T.B.*, 2013 MT 133, 370 Mont. 254, 301 P.3d 836.

In this case, the State did not meet the standard to terminate Father's parental rights. As stated earlier, at all relevant times the State treated the Father as a parent under the Montana state law and the ICWA. The State's own ICWA expert, Stevens, testified that the Father's parental rights should not be terminated and he should be given additional time to perform specific tasks under his treatment plan. Stevens also testified that the Father's continued custody with S.B.C., Jr. would not result in serious emotional or physical damage, and that the best interests of S.B.C., Jr., was to be with his Father. Stevens stood by her opinion even after being interrogated by the district court and State. In the

district court's order terminating parental rights, the court made no mention of expert Stevens' conclusion that the Father's parental rights should not be terminated. In neither the transfer hearing nor the termination of parental rights hearing, did an expert testify that the Father's continued custody would result in serious emotional or physical damage to the child. Without testimony from an expert, the district court could not terminate Father's parental rights. The State did not meet its statutory requirement under the ICWA and the order terminating Father's parental rights should be reversed.

CONCLUSION

The district court failed to appropriately follow the ICWA and Guidelines when it denied transfer to the Blackfeet Tribal Court. This matter should be transferred to the Blackfeet Tribal Court; a court that is inherently better equipped to protect the cultural heritage of S.B.C., Jr. The Tribe it will make a custody decision that will be in the best interests of S.B.C., Jr. After all, the Tribe has been making decisions regarding its own children for hundreds, even thousands of years.

The Father is a parent under Montana state law, and as such, he is entitled to all the protections that ICWA affords to an Indian parent. The State failed to meet its standard under the ICWA to prevent transfer to the Blackfeet Tribal Court. The district court also misapplied the ICWA and erred when it terminated

the Father's parental rights.

Respectfully submitted this_____day of July, 2014.

NATHAN ST. GODDARD
ATTORNEY FOR BLACKFEET TRIBE
P.O. Box 849
Browning, MT 59417-0849

By: _____
NATHAN ST. GODDARD
Attorney for Blackfeet Tribe

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellant to be emailed, mailed and/or hand delivered to:

TIMOTHY C. FOX
Montana Attorney General
C. MARK FOWLER Bureau Chief
Appellate Services Bureau
Attorney General's Office
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JANNA GOBEO
Attorney at Law
P.O. Box 3915
Missoula, MT 59806

FRED VAN VALKENBURG
Missoula County Attorney
200 W. Broadway
Missoula, MT 59802

ELIZABETH THOMAS
Elizabeth Cunningham Thomas, PLLC
P. O. Box 8946
Missoula, MT 59807-8946

CAROLYNN M. FAGAN
Post Office Box 18323
Missoula, MT, 59808

Dated July _____, 2014.

_____
NATHAN ST. GODDARD

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 9,438, including Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

NATHAN ST. GODDARD